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No. 93-1960

In The

Supreme Court of the United States

October Term, 1994

INTERNATIONAL TERMINAL CORPORATION,

Petitioner,

v.

M/T LOIRE AND LOIRE TRANSPORT, INC.,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For the Fifth Circuit

BRIEF OF RESPONDENT LOIRE TRANSPORT, INC. AS CLAIMANT OF THE M/T LOIRE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent Loire Transport, Inc. as Claimant of the M/T LOIRE ("Loire") prays that International Terminal Corporation's ("ITC") Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit be denied.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is attached as Appendix A to ITC's Brief.

STATEMENT OF THE CASE

The sole issue for review is the rate set for prejudgment interest by the District Court. ITC's Statement of the Case fails to mention that ITC stipulated in the Joint Pretrial Order that it is within the District Court's discretion to use the federal postjudgment interest rate under 28 U.S.C. § 1961 in setting the prejudgment rate. In pertinent part, the Joint Pretrial Order stated:

> 8. AGREED PROPOSITIONS OF LAW
>
> * * *
>
> 8. The trial court does not abuse its discretion in calculating prejudgment interest on a federal claim by looking to the federal standard established in 28 U.S.C. § 1961 instead of the rate established by a state statute. [citation omitted]
>
> * * *

ITC conceded this same point before the Court of Appeals below.

ITC recovered, as part of its award in the District Court, lost profits in the amount of $3,399,936.00. (See Appendix C to ITC's brief.) This sum is more than one-half of the total principal awarded. These lost profits represented revenues which the Court found that ITC would have earned over a fourteen month period beginning on 30 July 1987.

The District Court awarded prejudgment interest on ITC's total claim, including lost revenue, from 30 July 1987, until entry of judgment. The prejudgment rate was set at the postjudgment rate on the date the Court issued its opinion. The rate was 6.26%. The District Court did not find that ITC had actually borrowed funds at a higher rate of interest.

After the District Court entered its opinion, but before entry of its judgment (Appendix C to ITC's brief), ITC filed a Motion for Reconsideration urging, in part, reconsideration of the prejudgment rate. The District Court denied ITC's request. ITC then filed a Motion for New Trial after judgment was entered, again urging reconsideration of the prejudgment rate. This too was denied. At the Appellate level, ITC requested review of the rate. When the Court of Appeals affirmed the lower Court's judgment, ITC filed a Motion for Rehearing. This was denied.

ITC persists in alleging a claim of abuse of discretion by the District Court in setting the prejudgment interest rate despite its trial stipulation that it is not an abuse of discretion to use the postjudgment rate.

SUMMARY OF THE ARGUMENT

ITC's Petition for Writ of Certiorari should be denied as the District Court did not abuse its discretion in applying the postjudgment interest rate. Both ITC's admission in the Joint Pretrial Order that the District Court does not abuse its discretion in applying the postjudgment rate and its failure to show that there has been an abuse

establish that there is no reason for a review of the District Court's conclusion. Further, claims of a conflict between the Fifth and Seventh Circuit Courts of Appeals do not exist. Accordingly, ITC's alleged basis for review does not exist.

ARGUMENT

ITC in the Joint Pretrial Order conceded at the District Court level that it was within the discretion of that Court to use a federal postjudgment interest rate. This was also conceded by ITC in its brief to the Fifth Circuit. Nevertheless, ITC is unsatisfied by the District Court's use of its admitted discretion in awarding prejudgment interest at the 6.26%, the prevailing postjudgment interest rate on the date of entry of the Court's findings. 28 U.S.C. § 1961.

The award of prejudgment interest is within the sound discretion of the District Court. *Quesinberry v. Life Ins. Co. of North America*, 987 F.2d 1017, 1031 (4th Cir. 1993); *United States v. Central Gulf Lines, Inc.*, 974 F.2d 621, 630 (5th Cir. 1992), *cert. denied*, ___ U.S. ___, 122 L.Ed.2d 669 (1993); *Marathon Pipe Line Co. v. M/V SEA LEVEL II*, 806 F.2d 585, 593 (5th Cir. 1986); *Reeled Tubing, Inc. v. M/V CHAD G*, 794 F.2d 1026, 1029 (5th Cir. 1986).

Several Courts of Appeals have historically held that the District Court does not abuse its discretion by setting the rate based upon the postjudgment interest rate under 28 U.S.C. § 1961. *In re M/V NICOLE TRAHAN*, 10 F.3d 1190, 1196-97 (5th Cir. 1994); *Central Gulf Lines, Inc.*, 974 F.2d at 630; *Datascope Corp. v. SMEC, Inc.*, 879 F.2d 820, 828 (Fed. Cir. 1989), *cert. denied*, 493 U.S. 1024 (1990);

Western Pacific Fisheries, Inc. v. S.S. PRESIDENT GRANT, 730 F.2d 1280, 1288-89 (9th Cir. 1984) (postjudgment rate is applicable to prejudgment rate unless there is substantial evidence that such rate is inequitable).

Therefore, the District Court's award is reviewed under an abuse of discretion standard. *Golden Gate Hotel Ass'n v. San Francisco*, 18 F.3d 1482, 1485 (9th Cir. 1994). An abuse only occurs when the record contains no basis upon which the District Court could rationally have made its decision or if the judicial action is arbitrary, fanciful, or clearly erroneous. *Datascope Corp.*, 879 F.2d at 828. The review is not based on what the reviewing court would have ruled if it was considering the case in the first instance, but is whether the decision of the lower court is reasonable. *Antevski v. Volkswagenwerk Aktiengesellschaft*, 4 F.3d 537, 540 (7th Cir. 1993).

The District Court's award, therefore, is reviewed according to the equities of the case. *Osterneck v. E.T. Barwick Ind., Inc.*, 825 F.2d 1521, 1536 (11th Cir. 1987), *aff'd sub nom., Osterneck v. Ernst & Whinney*, 489 U.S. 169 (1989). In *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 176 (1989), this Court recognized the discretion in setting the rate by concluding that the review returns to "fundamental considerations of fairness." " '[I]nterest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to consideration of fairness.' " *Blau v. Lehman*, 368 U.S. 403, 414 (1962) quoting from *Bd. of County Comm'rs v. United States*, 308 U.S. 343, 352 (1939).

Since it was conceded by ITC that it is within the sound discretion of the District Court to set the

prejudgment interest rate as it did, ITC must prove that it was a clear abuse of the District Court's discretion to set the prejudgment rate based upon a postjudgment rate at the time of the entry of its findings despite its stipulation that that is not an abuse.

In arguing that the award is "noncompensatory by any relevant measure", ITC overlooks the fact that the prejudgment awarded starts from 30 July 1987, before any of the claimed lost revenues had accrued. The District Court, in its judgment, awarded ITC $3,399,936.00 in lost profits for a fourteen month period beginning on 30 July 1987. ITC received interest on more than one-half of its award before it had accrued.[1]

Therefore, in assessing its 6.26% prejudgment interest from 30 July 1987, to ITC's lost profits, ITC has received a bonus for the loss of funds that it did not have on that date. Evidently the Court took this into consideration in assessing the equities by setting the prejudgment interest rate at the prevailing postjudgment rate on the date of entry of its findings by back dating that prejudgment award for lost profits to 30 July 1987. This necessarily increases the effective yield on the rate set by the Court.[2]

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[1] In *Kim Crest, S.A. v. M/V SVERDLOVSK*, 753 F. Supp. 643, 650 (S.D. Tex. 1990), the District Court faced the same problem by awarding prejudgment interest on lost revenues in its discretion to only one-half of the lost revenue award.

[2] For instance, the difference between the interest earned on the total award from 30 July 1987, as compared to an award based on as the revenues were earned, results in ITC receiving a profit of approximately $110,000.

ITC also argues that there is a conflict between established Fifth Circuit law, *see e.g. United States v. Central Gulf Lines, Inc.*, 974 F.2d 621, 630 (5th Cir. 1992), and the Seventh Circuit decision *Matter of Oil Spill by the AMOCO CADIZ off the Coast of France on March 16, 1978*, 954 F.2d 1279 (7th Cir. 1992) ("*AMOCO CADIZ*"). There is no such conflict.

In *AMOCO CADIZ*, the court implicitly recognized that prejudgment is still within the District Court's discretion. *AMOCO CADIZ*, 754 F.2d at 1334-1335. The Seventh Circuit's ruling is merely based upon a finding that the District Court abused that discretion. *Id. AMOCO CADIZ* was a fact specific decision which involved protracted litigation (over 13 years) during which interest rates varied from 20% to 7.5%.[3] The average prime rate was 12% for the 13 years. The District Court used the postjudgment rate (7.5%) on the date of judgment. There is no evidence that while the case at bar was pending that interest rates fluctuated as wildly. In fact the average postjudgment rate was only 7.69%, while the average prime rate was only 9.25%. (ITC's brief at p. 5.) The equities supporting a rate at the postjudgment rate did not exist in a case which took 13 years to resolve at the trial level and during which interest rates fluctuated wildly.

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[3] *AMOCO CADIZ* relied upon an earlier Seventh Circuit decision, *Gorenstein Enterprises, Inc. v. Quality Care-USA, Inc.*, 874 F.2d 431 (7th Cir. 1989). *Gorenstein* involved similarly protracted litigation during which the prime interest rate fluctuated to as much as 20%. The District Court used a 9% rate. 874 F.2d at 436-437. Still the Seventh Circuit did not find an abuse of discretion. *Id.*

Similarly in *Gorenstein*, the Court recognized the District Court's discretion by stating that they "do not want to straitjacket the district judge. . . . " 874 F.2d at 437. The Court did, however, admonish the District Court not to set too low of an interest rate, but it did not find an abuse of discretion in that case.

Stripped to its essentials, *AMOCO CADIZ* is a fact determinative analysis of an abuse of discretion review of the District Court's actions.[4] That is in accord with the Fifth Circuit, and with this Court's view in *Blau*, for example, where prejudgment interest is awarded in response to fairness and not according to any rigid rule. 368 U.S. at 414. Since there is no intercircuit conflict, ITC's basis for review does not exist. Rule 10.1(a) of the Supreme Court Rules.

In the case at bar, however, the equities supporting the District Court do exist. The fact that ITC stipulated that the District Court could use the postjudgment rate is sufficient alone to support the award. In addition, the fact that the award of interest began to run on one-half of ITC's award even though that amount had not yet accrued on that date and the fact that the Court did not find ITC had actually borrowed funds at a higher interest rate support the Court's ruling.

ITC is requesting a further windfall by increasing that rate back to 30 July 1987. ITC does not, nor can it, state that the District Court applied a wrong legal standard in assessing the interest rate, nor is there anything

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[4] To interpret otherwise would put it in direct conflict with the decisions cited from this Court.

in the record to indicate that there has been a clear abuse of discretion by the District Court in setting the rate of interest as it has done so. The District Court's rate is imminently reasonable and fair under the facts.

CONCLUSION

For the reasons set forth above, Loire respectfully submits that the Petition for Writ of Certiorari should be denied as the setting of the prejudgment interest rate by the District Court is imminently reasonable and fair. Its affirmance by the Court of Appeals is correct.

Respectfully submitted,

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